

April 29, 2003

RECEIVED

APR 29 2003

BY HAND

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
c/o Vistronix, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

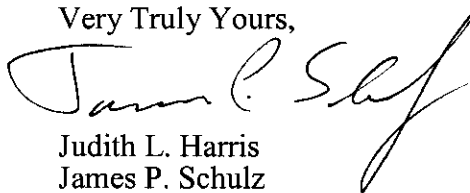
**RE: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,
CG Docket No. 02-278 (Further Notice of Proposed Rulemaking)**

Dear Ms. Dortch:

On behalf of Vector Marketing Corporation, and in accordance with Sections 1.49 and 1.419 of the Commission's Rules, 47 C.F.R. §§1.49 and 1.419, we are pleased to submit the attached Comments in the above-captioned proceeding.

Should you have questions regarding the enclosed, or require further information, please to not hesitate to contact the undersigned.

Very Truly Yours,



Judith L. Harris
James P. Schulz

cc: K. Dane Snowden
Margaret Egler
Richard Smith
Erica McMahon

No. of Copies rec'd
List A B C D E

049

1301 K Street, N.W.
Suite 1100 - East Tower
Washington, D.C. 20005-3373
202.414.9200
Fax 202.414.9299

Delaware
New Jersey
New York
Pennsylvania
United Kingdom
Virginia
Washington, DC

Formed in the Commonwealth of Pennsylvania

"Reed Smith" refers to Reed Smith LLP and related entities.

DCLB-0335367.01-JPSCHULZ
April 28, 2003 8:24 PM

reedsmith.com

**Before the
Federal Communications Commission
Washington, DC 20554**

RECEIVED

APR 29 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

**Supplemental Comments of Vector Marketing Corporation in Response to the
Commission's Further Notice of Proposed Rulemaking**

Vector Marketing Corporation ("Vector"), by its attorneys, hereby submits its Supplemental Comments in the above-captioned proceeding, specifically to respond to the Commission's request for comment on how the FCC can "maximize consistency with the FTC's rule."¹

Vector is the U.S. marketing arm of Cutco Cutlery Corporation ("CUTCO"), a manufacturer of fine cutlery products employing approximately 675 Steelworkers in Olean, New York. Vector markets CUTCO cutlery through a sales force of college-age students who sell CUTCO knives as local, independent sales contractors. As more fully described in Vector's initial Comments and Reply Comments in this proceeding, the students who make up Vector's sales force are "direct sellers" – *i.e.*, they do not sell CUTCO knives over the phone, but make

¹ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Further Notice of Proposed Rulemaking, CG Dkt. No. 02-278, FCC 03-62, ¶ 6, rel. Mar. 25, 2003 ("Further Notice").

face-to-face sales presentations in potential customers' homes. Thus, like other direct sellers, such as those who sell Shaklee or Avon products, these students' "business" use of their telephones is limited to a few phone calls per day to friends, family members, and to other people to whom they have been personally referred.

Such direct sellers are simply not part of the problem created by the emergence and phenomenal growth of the telemarketing industry that the Commission and the Federal Trade Commission are seeking to address through their respective rulemaking proceedings.

Accordingly, in its initial Comments in this proceeding, Vector urged the Commission to create a safe harbor or *de minimus*-use exemption from any requirements pertaining to do-not-call lists for small direct sellers like Vector, whose representatives make no more than 20 calls per day to friends, family members, and others to whom they have been personally referred, for the purpose of setting up face-to-face appointments.²

Subsequent to Vector's initial filing, the Federal Trade Commission ("FTC") released its amended Telemarketing Sales Rule ("TSR"),³ which modified a broad "face-to-face exemption" that had been present in the original TSR, and which had (prior to the amendment) completely exempted companies like Vector from the TSR.⁴ The FTC explained its action in a letter from FTC Secretary Donald S. Clark to Congressman Amo Houghton (R-NY).⁵ In its

² See Vector Marketing Corporation, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Comments, Dec. 9, 2002 ("Comments").

³ See *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 68 Fed. Reg. 4580 (Jan. 29, 2003).

⁴ 16 C.F.R. §310.6(c).

⁵ Letter from Donald S. Clark, Secretary of the Federal Trade Commission, to the Honorable Amo Houghton, dated Jan. 15, 2003 (appended hereto as "Attachment 1").

letter, the FTC stated that its forthcoming Compliance Guide for businesses would clarify that small direct sellers such as Cutco/Vector likely would not be impacted by the “do-not-call” provisions of the amended rule, and further stated that the Guide would “advise that individuals calling small numbers of personal referrals out of their own homes will not be targeted for law enforcement action by the FTC staff.”⁶

The FCC invited comments on the FTC’s amended TSR, as it relates to the instant proceeding, and extended the filing date for Reply Comments to permit sufficient time for interested members of the public to prepare such comments.⁷ In response, Vector filed Reply Comments advising the Commission of the stated enforcement intentions of the FTC and reiterating its request for a specific exemption in the FCC’s amended rules.⁸ Vector’s representatives also met personally with Commission staff to discuss such an exemption in the context of developments at the FTC.⁹

A short time after the meeting with FCC staff, the Do-Not-Call Act was signed into law.¹⁰ The Do-Not-Call Act requires the FCC, among other things, to “consult and

⁶ *Id.* at 2.

⁷ See Consumer And Governmental Affairs Bureau Announces An Extension Of Time To File Reply Comments On The Telephone Consumer Protection Act (TCPA) Rules, Public Notice, DA No. 02-3554, Dkt. No. 02-278, rel. Dec. 20, 2002.

⁸ See Vector Marketing Corporation, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Reply Comments, Jan. 31, 2003 (“Reply Comments”).

⁹ See Vector Marketing Corporation, *Notice of Oral Ex Parte Presentation in CG Docket No. 02-278, “Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,”* Feb. 24, 2003.

¹⁰ Do-Not-Call Implementation Act, Pub. L. No. 108-10, 177 Stat. 557 (2003) (“Do Not-Call Act”).

coordinate with the [FTC] to maximize consistency with the rule promulgated by the FTC in 2002.”¹¹

In response to the mandate of the Do-Not-Call Act, Vector has recommended to the Commission Staff specific language for an exemption from the FCC’s amended rule. The language tracks closely the stated enforcement intentions of the FTC with respect to the do-not-call provisions of the amended TSR.¹² Specifically, the suggested language would exempt from the FCC’s do-not-call requirements an “individual direct seller who calls no more than 20 personal referrals per day.”¹³ The language also provides definitions for the terms “direct seller” and “personal referrals.”

Vector believes that the FCC, by creating a specific exemption from the “do not call” provisions of its rule for small direct sellers like Vector/Cutco, will indeed promulgate a rule that is fully consistent with the exemptions found in the FTC’s rule,¹⁴ as interpreted by the FTC’s letter to Rep. Houghton. Such an exemption would also help to narrowly tailor the FCC’s amended rule by addressing only those callers and calls that violate the privacy interests that the government is seeking to protect, and excluding those entities and calls that are not part of the problem, thereby strengthening the amended rule against possible Constitutional challenges.

Conversely, an FCC rule that does not exempt small direct sellers like Vector/Cutco from its sweep would be inconsistent on its face with the stated enforcement

¹¹ Further Notice at ¶1.

¹² See Vector Marketing Corporation, *Notice of Written Ex Parte Presentation in CG Docket No. 02-278, “Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,”* April 28, 2003.

¹³ The complete text of the proposed language is appended hereto as Attachment 2.

intentions of the FTC, and, consequently, also would be inconsistent with the statutory mandate of the Do-Not-Call Act.

Accordingly, Vector urges the Commission to exempt from the do-not-call provisions of its rule small direct sellers who make no more than 20 calls per day to their friends, family or others to which they have been personally referred.

Respectfully submitted,

Vector Marketing Corporation

By: 

Judith L. Harris
James Philip Schulz
REED SMITH, LLP
1301 K Street, NW
Suite 1100 – East Tower
Washington, DC 20005
(202) 414-9200
(202) 414-9299 (fax)

Its attorneys

Continued from previous page

¹⁴ See 16 C.F.R. §310.6(c).

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of April, 2003, caused copies of the foregoing "Supplemental Comments of Vector Marketing Corporation" to be served by hand on the following:

Michael K. Powell, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Margaret Egler
Assistant Bureau Chief
Consumer And Government Affairs Bureau
445 12th Street, S.W.
Washington, D.C. 20554

Kathleen Q. Abernathy, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Richard Smith
Acting Chief, Policy Division
Consumer And Government Affairs Bureau
445 12th Street, S.W.
Washington, D.C. 20554

Michael J. Copps, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Erica McMahon
Attorney Advisor
Consumer And Government Affairs Bureau
445 12th Street, S.W.
Washington, D.C. 20554

Kevin J. Martin, Commissioner
Federal Communications Commission
445 12th Street, N.W.
Washington, D.C. 20554

Jonathan S. Adelstein, Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

K. Dane Snowden
Chief, Consumer And Government Affairs Bureau
445 12th Street, S.W.
Washington, D.C. 20554



Laini Dakar, Legal Secretary
Reed Smith LLP

ATTACHMENT 1



Office of the Secretary

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

January 15, 2003

The Honorable Amo Houghton
United States House of Representatives
1111 Longworth House Office Building
Washington, D.C. 20515

Dear Representative Houghton:

A member of your staff, Erica Ferri, recently contacted the Commission concerning the possible effects which the amendments to the Telemarketing Sales Rule (TSR) may have on CUTCO and the 675 Steelworkers employed by the company. The Commission has now issued the final amended Rule and an accompanying Statement of Basis and Purpose, pursuant to its Rule Review, the Telemarketing and Consumer Fraud and Abuse Prevention Act, and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act). I have enclosed a copy of the news release describing this action for your information.

The amended Rule: (1) retains most of the original Rule's requirements concerning deceptive and abusive telemarketing acts or practices without major substantive changes; (2) establishes a national "do-not-call" registry maintained by the Commission; (3) defines "upselling" to clarify the amended Rule's application to these transactions, requires specific disclosures for upsell transactions, and expressly excludes upselling transactions from certain exemptions in the amended Rule; (4) requires that sellers and telemarketers accepting payment by methods other than credit and debit cards subject to certain protections obtain express verifiable authorization from their customers; (5) retains the exemptions for pay-per-call, franchise, and face-to-face transactions, but makes these transactions subject to the national "do-not-call" registry and certain other provisions in the abusive practices section of the Rule; (6) specifies requirements for the use of predictive dialers; (7) requires disclosures and prohibits misrepresentations in connection with the sale of credit card loss protection plans; (8) requires an additional disclosure in connection with prize promotions; (9) requires disclosures and prohibits misrepresentations in connection with offers that include a negative option feature; (10) eliminates the general media and direct mail exemptions for the telemarketing of credit card loss protection plans and business opportunities other than business arrangements covered by the

Franchise Rule¹; (11) requires telemarketers to transmit caller identification information; (12) eliminates the use of post-transaction written confirmation as a means of obtaining a customer's express verifiable authorization when the goods or services are offered on a "free-to-pay conversion" basis; (13) prohibits the disclosure or receipt of the customer's or donor's unencrypted billing information for consideration, except in limited circumstances; and (14) requires that the seller or telemarketer obtain the customer's express informed consent to all transactions, with specific requirements for transactions involving "free-to-pay conversions" and preacquired account information.

The amended Rule will become effective sixty days after the Statement of Basis and Purpose and the amended Rule are published in the Federal Register, and full compliance with the caller identification transmission provision will be required within 365 days after the date of publication. The Commission will announce at a future time the date by which full compliance with Section 310.4(b)(1)(iii)(B), the "do-not-call" registry provision, will be required. The Commission anticipates that full compliance with the "do-not-call" registry provision will be required approximately seven months from the date a contract is awarded to create the national registry.

With respect to implementation of the "do-not-call" registry, I should also note that the Commission is working with the states to develop a single, national registry. The Commission envisions allowing consumers throughout the United States to register their preference not to receive telemarketing calls in a single transaction with one governmental agency. In addition, the Commission anticipates allowing telemarketers and sellers to access that consumer registration information through one visit to a national website, developed for that purpose. To further those goals, the Commission will allow all states, and the Direct Marketing Association (DMA), if it so desires, to download into the national registry—at no cost to the states or the DMA—the telephone numbers of consumers who have registered with them their preference not to receive telemarketing calls. Telemarketers and sellers will be allowed to access that data through the national registry as the information is received. It will take some time to achieve these goals completely, however, and the Commission will continue to work diligently with the states in an effort to harmonize these different systems.

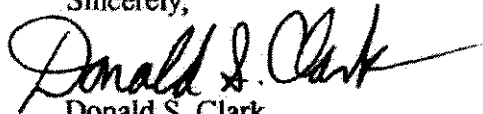
Finally, regarding your specific question, we expect the Commission will clarify in its Compliance Guide for businesses that small direct sellers, such as individuals selling CUTCO products, are unlikely to be impacted by this provision of the Rule. The staff currently preparing compliance guides anticipates, in particular, that these guides will advise that individuals calling small numbers of personal referrals out of their own homes will not be targeted for law enforcement action by the FTC staff. Of course, if a small direct seller wanted to avoid contacting a person whose number is on the registry, we anticipate that a single number lookup feature will be included in the registry to facilitate such efforts at no cost to the seller.

¹ Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures ("Franchise Rule"), 16 CFR Part 436.

The Honorable Amo Houghton -- Page 3

We appreciate your interest in this matter, and hope that the above information and the enclosed materials are of assistance. Please let us know whenever we can be of service.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald S. Clark". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Donald S. Clark

Secretary of the Commission

ATTACHMENT 2

PROPOSED LANGUAGE FOR FCC EXEMPTION

Assuming the FCC will maintain the basic structure of the existing TCPA rules, but add, delete or change provisions depending on specific inputs from the rulemaking process, Vector respectfully requests that the Commission consider the following in formulating an exemption for small direct sellers that is in keeping with the stated enforcement intentions of the FTC:

At current 47 C.F.R. §64.1200(f)(3) (definition of *telephone solicitation*), insert the language in **bold**:

(f) As used in this section:

* * *

(3) The term *telephone solicitation* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship;

(iii) By or on behalf of a tax-exempt nonprofit organization; or

(iv) By an individual direct seller who calls no more than 20 personal referrals per day.

(4) The term *established business relationship* means a prior existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(5) The term *direct seller* means an individual who does not complete the sale of goods or services, and does not require payment or authorization of payment for such goods or services, until after the seller has actually made a complete face-to-face sales presentation.

(6) The term *personal referrals* means those individuals who are either known personally to the direct seller or who are referred to the direct seller by someone personally known to the referring source.

* * *
